Supreme Court, U. S.
FILED
APR 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79 - 1222

CYNTHIA K. MESSER, ADMINISTRATRIX OF THE ESTATE OF JAMES RICHARD BRAEDYN, DECEASED

V.

AMERICAN GEMS, INC.; EMERALD VALLEY CAMPER's CLUB, INC.; EMERAL VALLEY DISTRIBUTION CORP., INC.; LOIS R. RIST
Petitioners

BRIEF IN OPPOSION TO PETITION FOR CERTIORARI

Creighton W. Sossomon
4 West Main Street
Post Office Box 188
Sylva, North Carolina 28779

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA. (804) 643-7789

INDEX

Opinions Below ---------- 1
Jurisdiction ---------- 1
Questions Involved ---------- 1
Statement of Facts ---------- 2
Argument ---------- 2
Conclusion ---------- 6

CASE CITATIONS

Mecom v. Fritzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233 ---------- 4

Miller v. Perry, 456 F. 2d 63 (4th Circuit. 1972) ---------- 4

Sadler v. New Hanover Memorial Hospital, 588 F. 2d 914 (4th Circuit 1978) - 4

STATUTES & RULES

Rule 19, Supreme Court Rules ------ 6
28 U. S. C. §1332 ---------- 2
28 U. S. C. §1359 ---------- 5

The Respondent, Cynthia K. Messer, Administratrix of the estate of James Richard Braedyn, deceased, the Plaintiff in this proceeding, respectfully prays that Defendant's, American Gems, Inc., Petition for Certiorari to the Fourth Circuit Court of Appeals to review that court's decision of January 3, 1980, be denied.

OPINIONS BELOW, AND JURSIDICTION

The Respondent accepts these portions of Petitioner's brief as presented.

QUESTIONS INVOLVED

Respondent submits that the "question involved" is more specifically stated as: Where an action is brought in the Federal Courts by a decedent's non-domicillary representa-

tive under North Carolina's wrongful death statute does the citizenship of the representative or of the statutory heirs and recipients of the proceeds control in determining diversity jurisdiction under 28 U. S. C. §1332.

STATEMENT OF FACTS

Respondent accepts Petitioner's statement.

ARGUMENT

Respondent asserts that, without enumerating the extensive authorities relied upon by the Court of Appeals below, that court held that regardless of whether or not a state's statutes require that the personal representation be a resident, the underlying reality, at least for this case, is that she is no more than a nominal party to the action. She is

present only becasue a statute says that this action for wrongful death must be prosecuted in the name of the representative. It is perhaps true that the facts of this case are unique in that the decedent had no assets in North Carolina, save the proceeds of the action. The decedent and all his statutory distributiees were Florida residents and the remainder of his estate is in that state, though unadministered. The only possible role of the Plaintiff here, therefore, is to bring the action and, if successful, distribute the proceeds as directed by law. In short, she has no possible "stake" in the outcome of the law suit.

The decision of the Court of

Appeals is consistent with previous holdings of both this Court, particularly Mecom vs. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (1931), and with others in the Fourth Circuit including Sadler v. New Hanover Memorial Hospital, 588 F. 2d 914 (4th Cir. 1978). The consistency lies in the role of the Plaintiff in each case, the possibility for or reality of collusive appointment to gain federal jurisdiction, and, as noted by the court below, "... the goal of such jurisdiction: 'the protection of the non-citizen who is obliged to sue or be sued in the state of his adversery: Miller (v. Perry), 456 F. 2d at 67", (Petition, Appendix B, p. 59).

True, it may be argued that the present status of the class of suits to which this case belongs, those brought by persons in representative capacity, is somewhat confusing. Both attorney and judge must be alert to the precise role of the particular representative because the determination of the "real parties in interest" seems to resolve around the actual powers of the particular representative and the opportunities present for collusive appointment in violation of 28 U. S. C. §1359. Given this situation, however, Respondent asserts that the decision below is correct. Plaintiff, under North Carolina law has no real powers whatsoever; her appointment was anything

but collusive and her "stake" in the outcome is zero - she probably is not entitled to even payment for use of her name as the recovery is not estate assets from which such a fee is collectible.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals is consistent with that Circuit's previous holdings and with decisions of the Court. No other basis set forth in Rule 19(1) of the Rules of the Supreme Court of the United States are involved here. The Petition should, therefore, be denied.

Respectfully submitted,

Creighton W. Sossomon
Attorney for Respondent
4 W. Main St.
Sylva, N. C. 28779
Phone: 704-586-5511

CERTIFICATE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I have this the 23rd day of April, 1980, filed the required copies of Respondent's Brief in Opposition to Petition for Certiorari in the Clerk's Office in Washington, D. C. and have mailed the required copies of Brief to Max F. Ferree, Attorney for Petitioners, Court Square, Wilkesboro, N. C. 28697.

Creighton W. Sossomon
Attorney for Respondent